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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE COMPLAINT
OF STEVE PRAHIN,

Complainant,

v.

PAYSON WATER COMPANY,

Respondent.

DOCKET NO: W-03514A-07-0386

**MOTION TO DISMISS FOR FAILURE
TO STATE A CLAIM**

Pursuant to Rule 12(b)(6), Ariz. R. Civ. P., Respondent Payson Water Company ("Payson Water" or "Respondent") hereby moves to dismiss Steve Prahin's ("Complainant") complaint for failure to state a claim for which relief can be granted.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual Background

1. Payson Water holds a Certificate of Convenience and Necessity ("CC&N") issued by the Arizona Corporation Commission ("Commission"). The CC&N gives Payson Water the right to provide water utility service to customers in the Payson area of Gila County, Arizona. On May 5, 2006, in Decision No. 68696 (Docket No. W-03541A-05-0729), the Commission granted a variance to an existing moratorium on new service connections, and ordered Payson Water to connect the Whispering Pines Fire District and eight additional new customers, which included Complainant.

1 2. On October 26, 2006, Complainant filed a letter in Docket No. W-03541A-
2 05-0729 in which he expressed an opinion about the existing moratorium, alleged that
3 Payson Water was under-utilizing available water in the area, and made representations
4 about alleged comments made to him in a parking lot. Complainant also requested that
5 the Commission amend Decision No. 68696 by revising the moratorium to allow three (3)
6 new connections per month for a full year, and to extend monitoring and reporting
7 requirements imposed on Payson Water for another twelve (12) months.

8 3. On November 30, 2006, the Commission's hearing division issued a
9 procedural order requiring Payson Water to submit a written response to Complainant's
10 October 26, 2006 letter by January 2, 2007. On January 4, 2007, Payson Water filed its
11 Response.

12 4. In its Response, Payson Water categorically denied Complainant's
13 allegations concerning parking lot conversations. In addition, Payson Water referred to its
14 December 26, 2006 report on water supply alternatives for the Geronimo Estates and
15 Elusive Acres subdivisions in rebutting Complainant's claims of under-utilized water
16 supplies in the area.

17 5. On June 25, 2007, Complainant filed a formal complaint against Payson
18 Water. The first few paragraphs of this "formal complaint" refer specifically to matters
19 already being addressed in Docket No. W-03541A-05-0729 – that a portion of Payson
20 Water's January 4, 2007, Response was "insulting" to him personally, and that recent data
21 illustrates that water is being under-utilized in the Geronimo Estates and Elusive Acres
22 subdivisions. The remainder of the complaint alleges that Respondent utilizes "bullying"
23 tactics in dealing with customers, and questions whether more should be required to
24 ensure Payson Water is complying with water quality regulations. Despite his various
25 allegations, the Complainant fails to request any specific relief.

26

1 6. On October 16, 2007, a procedural conference was held. During the
2 procedural conference, Complainant explained that his complaint was about the Payson
3 Water storage system, and wanted to discuss potential improvements in order to increase
4 water supply for customers residing in the Geronimo Estates and Elusive Acres
5 subdivisions. Despite the fact that water supply issues have already been addressed in
6 Docket No. W-03541A-05-0729, Payson Water nevertheless agreed to hold an
7 informational meeting with customers to discuss the storage and distribution system.

8 7. On November 10, 2007, Payson Water held a meeting with customers from
9 Geronimo Estates and Elusive Acres. The meeting was attended by Commission Staff.
10 After the meeting, Commission Staff member Bradley Morton filed a memorandum with
11 Administrative Law Judge Nodes explaining what was discussed at the meeting.
12 Mr. Morton stated that:

13
14 The primary concerns by residents were a request for a new well
15 and/or the deepening of the Geronimo Well as well as increased storage.
16 The increased storage would allow it to fill during the week so when
17 weekend residents come up there would be no outages. They would also
18 like to see enough well production to allow the Moratorium to be lifted.
There was a brief public comment session followed by questions and
answers.

19 8. Payson Water has agreed to meet with residents once again to discuss the
20 Geronimo Estates and Elusive Acres' water systems, including issues concerning water
21 supply and storage. Payson Water asserts that such discussions pertain to issues relating
22 to Docket No. W-03541A-05-0729, and that the dismissal of the complaint will not affect
23 its continued open dialogue in this regard.

24 **II. Legal Analysis**

25 9. The defense of failure to state a claim for which relief can be granted may
26 be asserted in a motion to dismiss. See Ariz. R. Civ. P. 12(b). Dismissal for failure to

1 state a claim is appropriate when, “as a matter of law ... plaintiff[] would not be entitled
2 to relief under any interpretation of the facts susceptible to proof.” Rowland v. Kellogg
3 Brown & Root, Inc., 210 Ariz. 530, 534, 115 P.3d 124, 128 (App. 2005), *quoting* Fidelity
4 Sec. Life Ins. Co. v. State Department of Insurance, 191 Ariz. 222, 954 P.2d 580, 582
5 (1998). The non-moving party should be given an opportunity to amend the complaint
6 only if an amendment would cure its defects. Wigglesworth v. Mauldin, 195 Ariz. 432,
7 439, 990 P.2d 26, 33 (App. 1999).

8 10. The Complainant fails to state a claim for which the Commission can grant
9 relief. There is no allegation of any violation by Payson Water of Arizona law, or any
10 rule, regulation or order of the Commission. In fact, a majority of the complaint raises
11 issues currently being addressed in Commission Docket No. W-03541A-05-0729.

12 11. Even if the Respondent’s January 4, 2007, Response filed in Docket No.
13 W-03541A-05-0729 was “insulting” to the Complainant, which Payson Water
14 categorically denies, the Commission has no statutory basis to grant relief for what might
15 be considered a tort. Likewise, the Commission cannot grant relief for alleged “bullying
16 tactics” that Payson Water allegedly employs in dealing with customers, which
17 Respondent categorically denies ever occurred, in the absence of any violation of Arizona
18 law or Commission rule or order.

19 12. It is clear from Complainant’s own presentation during the October 16, 2007
20 procedural conference, as well as Mr. Morton’s November 10, 2007 memorandum, that
21 the basis of the complaint relates to matters already addressed in Docket No. W-03541A-
22 05-0729; these matters include Payson Water’s storage system and water supply,
23 continual pumping of water by existing wells and lifting the moratorium.

24 13. Complainant’s comments concerning necessary precautions to protect the
25 quality of Payson Water’s water supply fail to allege facts sufficient to support a claim
26 that precautions have not been implemented. Payson Water is currently in compliance

1 with all Arizona Department of Environmental Quality rules and orders governing water
2 quality and storage requirements.

3 14. Even if Complainant were allowed to amend his complaint to allege specific
4 violations of Arizona law and/or Commission rule or decision to address the concerns he
5 expressed during the procedural conference and community meeting, the Commission
6 cannot grant relief without amending Decision No. 68696 pursuant to A.R.S. §40-252. In
7 its Staff Report dated January 2, 2007, filed in Docket No. W-03541A-05-0729,
8 Commission Staff recommended that the Commission not adopt Complainant's
9 suggestions.

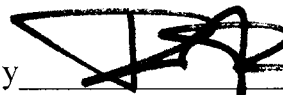
10 **CONCLUSION**

11 Complainant's allegations concerning personal insults and bullying tactics by
12 Payson Water are, even if true, non-actionable. Complainant's concerns about Payson
13 Water's storage capacity, water supply and the current moratorium have been addressed
14 by the Commission in Docket No. W-03541A-05-0729. Furthermore, none of the
15 concerns result in a specific allegation that Payson Water has violated Arizona law, or
16 rule, regulation or order of the Commission. As a consequence, Payson Water
17 respectfully requests that the Commission dismiss the complaint because Complainant has
18 failed to state a claim for which relief can be granted.

19 RESPECTFULLY SUBMITTED this 10th day of January, 2008.

20 FENNEMORE CRAIG, P.C.

21
22
23 By



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2 **ORIGINAL** and thirteen (13) copies
3 of the foregoing filed this 11th day of January, 2008:

4 Docket Control
5 Arizona Corporation Commission
6 1200 W. Washington St.
Phoenix, AZ 85007

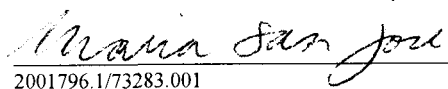
7 **Copy of the foregoing hand delivered**
8 this 11th day of January, 2008 to:

9 Dwight Nodes, Assistant Chief Administrative Law Judge
10 Hearing Division
11 Arizona Corporation Commission
12 1200 West Washington
13 Phoenix, Arizona 85007

14 Bradley Morton, Consumer Services
15 Utilities Division
16 Arizona Corporation Commission
17 1200 West Washington Street
18 Phoenix, Arizona 85007

19 **Copy of the foregoing mailed**
20 this 11th day of January, 2008 to:

21 Steve P. Prahin
22 HC 7, Box 452
23 Payson, AZ 85541

24 
25 2001796.1/73283.001